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IN THE

Supreme Court of the United States

No. 700 October Term, 1959

TWO GUYS FROM HARRISON-ALLENTOWN, INC.,

Petitioner

v.

PAUL A. McGINLEY, DISTRICT ATTORNEY, COUNTY OF LEHIGH, PENNSYLVANIA, and GEORGE J. JOSEPH, DISTRICT ATTORNEY, COUNTY OF LEHIGH, PENNSYLVANIA,

Respondents

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

BRIEF FOR RESPONDENTS IN OPPOSITION

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QUESTION PRESENTED

Where a three-judge district court, properly convened pursuant to 28 U.S.C. §§2281 and 2284, hears and decides both the question of the constitutionality of a state statute and the question of discriminatory enforcement of that statute in the same proceeding, is an appeal from its final order taken directly to the United States Supreme Court under 28 U.S.C. §1253, or is such appeal split, the issue of statutory constitutionality being taken directly to the United States Supreme Court and the issue of discriminatory enforcement being taken to the appropriate Court of Appeals under 28 U.S.C. §1291?

STATEMENT OF THE CASE

This proceeding began on Saturday, November 22, 1958, when the petitioner filed its complaint in the United States District Court for the Eastern District of Pennsylvania. It alleged (1) that the Pennsylvania Sunday law, Act of June 24, 1939, Pamphlet Laws 872, §699.4, 18 Pa. Stat. Ann. §4699.4, violated the guarantees of the Fourteenth Amendment to the federal constitution in that it (a) was a law respecting an establishment of religion and (b) was unreasonably discriminatory on its face; (2) that respondent Paul A. McGinley, then District Attorney of Lehigh County, Pennsylvania, had enforced the law in an unconstitutionally discriminatory fashion.

Simultaneous with the filing of the complaint, petitioner presented ex parte to Senior District Judge George A. Welsh a proposed order ordering the (1) convening of a three-judge district court pursuant to 28 U.S.C. §2284, (2) issuance of a temporary restraining order against respondent McGinley, and (3) holding of a further hearing on November 25, 1958. This order was signed by Judge Welsh.

Three days later the ordered hearing was held before District Judge Allen K. Grim. Respondents vigorously argued that no substantial federal question was presented by petitioner's complaint and urged its immediate dismissal. The next day, November 26, 1958, Judge Grim, agreeing that no substan-

tial federal question was presented, entered an order dismissing the complaint and dissolving the temporary restraining order.

Petitioner immediately filed an appeal from Judge Grim's order to the Court of Appeals for the Third Circuit. The judgment and opinion of that Court was handed down on March 25, 1959, but was amended on April 20, 1959. The nub of its decision was that Judge Grim had no jurisdiction to act in any way since Judge Welsh's original order, submitted ex parte by petitioner, had determined that a substantial federal question did exist and that a three-judge district court should be convened. Accordingly, Judge Grim's order was vacated and the cause remanded. *Two Guys from Harrison-Allentown, Inc. v. McGinley*, 266 F. 2d 427 (3rd Cir. 1959).

In its opinion the Court of Appeals pointed out that the three-judge court could further hear and determine the issue of whether a substantial federal question was presented by the attack on the statute and could, if it decided that issue in the affirmative, hear all issues in the case, including the issue of discriminatory enforcement. If it decided that issue in the negative, stated the Court, it could dissolve into a court of one judge who could determine the discriminatory enforcement issue. 266 F. 2d 427, 432.

A three-judge district court was then designated. On September 4, 1959, pursuant to agreement of the parties, petitioner filed an amended complaint, adding the Pennsylvania Act of August 10, 1959, to its allegations of invalidity. This act added §699.10 to the aforementioned Act of June 24, 1939 (which, in

fact, is the Penal Code of the Commonwealth). Petitioner also asked that respondent McGinley also be temporarily restrained from enforcing this new act which was due to become effective on September 10, 1959 (a Thursday, so that the first practical effect of the act would not be felt until Sunday, September 13, 1959).

The three-judge court ordered argument on the request for a temporary restraining order. On September 11, 1959, this argument was held, and respondents reiterated, as forcefully as possible, their arguments that no substantial federal question was presented by petitioner's attacks on the two Pennsylvania statutes. The same day the court entered an order temporarily restraining respondent McGinley from enforcing the new act, 699.10. He was thus under restraint with respect to both acts.

The case was then set for trial on the merits. This trial was held before the three-judge district court on October 13 and 14, 1959. Following the lodging of the testimony, briefs were submitted; and oral argument on the merits was held on November 19, 1959. Both parties submitted requests for findings of facts and conclusions of law on November 23, 1959.

On December 1, 1959, the District Court handed down its opinion determining that petitioner was not entitled to any relief. The court reviewed the history of Sunday law decisions in this Court, going with great detail into a discussion of *Friedman v. New York*, 341 U. S. 907 and its meaning for the present case. The court concluded that the *Friedman* case was of controlling authority as to the religion issue

and, together with other decisions of this Court, also disposed of petitioner's argument concerning the allegation of arbitrary classification by the statute. Moreover, it found an independently rational basis for legislative enactment of §699.10 in 1959, finding that this new act was designed to cope with the area of Sunday activity in which violations were more prevalent and less deterrable by the earlier statute, §699.4. Finally, it found no reason to make an anticipatory finding concerning the enforcement of the 1959 act, having determined that petitioner was in no jeopardy under the 1939 section. It concluded that petitioner had failed to show any violation of the federal constitution.

A final order denying a permanent injunction and dismissing petitioner's complaint was entered on December 7, 1959.

The next day petitioner filed a notice of appeal to the Court of Appeals for the Third Circuit from that part of the opinion and final order dealing with the issue of discriminatory enforcement. Following argument on December 9, 1959, the Court of Appeals entered an order dismissing the appeal for want of jurisdiction (Petition for Writ of Certiorari, Appendix C). Its subsequent opinion (Petition, Appendix B) refuted petitioner's contention that a split appeal could be taken from the order of the District Court.

ARGUMENT

1. The question is moot. The substantive issue underlying this procedural question—i.e., the alleged discriminatory enforcement of §69.4 by respondent McGinley—no longer poses a controversy. Respondent McGinley's term of office expired on January 4, 1960; and since the action against him was solely in his official capacity, seeking only prospective relief, no basis remains for granting relief on this issue.

2. The decision of the Court of Appeals was clearly correct. First, the order of the District Court was an order denying a permanent injunction. An appeal from such an order lies only to the Supreme Court. 28 U.S.C. §1253.

Second, no authority exists for splitting an appeal in the fashion suggested by petitioner. The cases cited by petitioner, such as *Phillips v. United States*, 312 U. S. 246, to support its position are cases in which it was found that *no* issue properly cognizable by a three-judge district court was presented; that, therefore, such a court lacked jurisdiction to hear the case; and that the case should be remanded for an appeal as if one judge had heard the controversy.

This case is entirely different. Here, the issue of the validity of the statutes posed an issue cognizable only by a three-judge district court; and, having thus properly acquired jurisdiction, that court had jurisdiction to decide all issues presented. *Louisville and*

Nashville R. Co. v. Garret, 231 U. S. 298, 303; *Sterling v. Constantin*, 287 U. S. 378, 393; *Two Guys from Harrison-Allentown, Inc. v. McGinley*, 266 F. 2d 427, 432. The court would have erred had it referred the issue of discriminatory enforcement back to a single district judge.

Third, the heart of petitioner's error is in regarding the judgment of the lower court simply as one that no substantial federal question existed with respect to the issue of constitutionality of the statutes. Since respondents argued to this effect both before the Court of Appeals, following Judge Grim's order of November 25, 1958, and before the three-judge court at the restraining order proceeding of September 11, 1959, and was overruled both times, no such finding could subsequently be made. Since presence of a substantial federal question is jurisdictional to proceedings such as this, *Ex parte Poresky*, 290 U. S. 30, *Chicago Water Service Company v. City of Redding*, 304 U. S. 252, the District Court's issuance of the temporary restraining orders and decision to hear the case on its merits can only be viewed as a determination that a substantial federal question was presented by petitioner's complaint. The fact that trial and argument on the merits actually were held confirm this conclusion.

Moreover, the opinion of the District Court, in analyzing the *Friedman* case so thoroughly and in referring to the legislative basis for the 1959 act (§699.10), adds further substance to respondents' position. That the opinion relies in part on existing precedent rather than some new analysis does not detract from this

position. Finally, the final order denying a permanent injunction is inconsistent with the motion that only a want of a substantial federal question was found. Were the petitioner correct, the only proper order would have been to vacate the temporary restraining order and to dismiss the complaint. Denial of a permanent injunction presupposes a prior hearing on the merits; such a hearing was certainly held in this case.

Respondents recognize that problems exist concerning proper procedure under 28 U.S.C. §2284. It sought to raise one of these problems in the initial stages of the case by protesting Judge Welsh's call for a three-judge district court on petitioner's ex parte presentation. This problem no longer is presented in the case, however. Respondents contend here that the District Court, having preliminarily determined that a substantial federal question was presented, having heard the case on its merits and having denied a permanent injunction, cannot now be regarded as deciding only that no substantial federal question is involved simply because it relied on existing precedent to support a part of its opinion.

No conflict of decisions by lower federal courts exists. No important or novel question is presented. The procedural issue raised has long been settled. The substantive issues of the underlying case are all raised by the jurisdictional statement at No. 699 October Term 1959 and are not in question.

CONCLUSION

For the foregoing reasons it is respectfully submitted that this petition for a writ of certiorari should be denied.

Respectfully submitted,

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March 11, 1960